The Cross-Dressing Case for Bathroom Equality

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I. INTRODUCTION

It is a basic fact of biology that every person requires access to the bathroom. Today, for transgender people,[1] this right of access is often held hostage by thoughtless and uninformed authorities. As a result of bathroom discrimination, transgender people frequently suffer health problems and face violence or harassment. Bathroom inequality is one of the greatest barriers to full integration of transgender people in American life. And, even more, opponents of transgender-inclusive nondiscrimination laws have systematically embraced a strategy of leveraging the discomfort and fears people have around bathroom safety and privacy to foment opposition to transgender equality.

This Article offers a new set of arguments for transgender equality based on a little-known series of cases in which courts declined to enforce cross-dressing laws against transgender defendants. As shown below, the arguments brought by the defenders of these laws closely mirror the arguments brought today in favor of bathroom discrimination. In this Article, we put both the bathroom and cross-dressing debates in historical context, draw out the underlying reasoning in the two sets of cases, and argue that the reasoning that supports bathroom discrimination is as flawed as the reasoning behind criminal cross-dressing laws. The analy-

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1. We use the term transgender throughout the Article as an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to: pre-operative, post-operative, and non-operative transsexual people; male and female cross-dressers (sometimes referred to as "transvestites," "drag queens," or "drag kings"); intersexed individuals; and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender atypical. PAISLEY CURRAH & SHANNON MINTER, NATIONAL CENTER FOR LESBIAN RIGHTS AND THE POLICY INSTITUTE OF THE NATIONAL GAY AND LESBIAN TASK FORCE, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 3 (JUNE 19, 2000), *available at* http://www.thetaskforce.org/downloads/reports/reports/TransgenderEquality.pdf.

sis also suggests that, just as the arguments for cross-dressing prohibitions have not withstood advances in public understanding of transgender people and their lives, neither will the arguments for bathroom discrimination.

In Part I, we discuss the current state of the law, present personal testimonials of transgender people denied bathroom access, place the bathroom debate in historical context, and show how that debate evolved to the present day. In Part II, we analyze the body of case law dealing with bathroom access and discrimination, outlining the types of arguments brought by anti-transgender advocates to justify withholding bathroom access: preventing fraud and crime, discouraging overt homosexuality, and enforcing gender norms. In Part III, we analyze the body of case law dealing with the cross-dressing laws, demonstrate that defendants used the same arguments being used today in the bathroom context, and show how the courts rejected these arguments. In Part IV, we compare the two bodies of case law and offer new arguments for bathroom-access equality.

II. BATHROOM EQUALITY: HISTORY OF THE DEBATE

A. Contemporary Situation

The past two decades have brought many advances in equal rights for transgender individuals. Beginning in the early 1990s, the queer movement began to advocate inclusive nondiscrimination protections that would include gender identity and expression as protected characteristics. In 1993, Minnesota became the first state to add language to its state nondiscrimination law to ensure that transgender people would be protected.[2] The second state to do so was Rhode Island in 2001.[3] Today, thirteen states and the District of Columbia prohibit discrimination based on gender identity,[4] and a number of other states continue to pursue

2. Minnesota Human Rights Act, MINN. STAT. § 363A.03 (2009); MINN. STAT. § 363A.08 (2009) (employment); MINN. STAT. § 363A.09 (2009) (housing/property); MINN. STAT. § 363A.13 (2009) (education); MINN. STAT. § 363A.16 (2009) (credit).

3. R.I. GEN. LAWS § 28-5-3 (2009).

4. California, CAL. GOV'T CODE § 12920 (2010); Colorado, COLO. REV. STAT. §§ 24-34-402, -502 (2009); District of Columbia, D.C. CODE §§ 2-1402.11, .21, .41 (2010); Hawaii, HAW. REV. STAT. § 515-3 (2009); Illinois, 775 ILL. COMP. STAT. 5/1-103 (2009); Iowa, IOWA CODE §§ 216.6, .8–10 (2009); Maine, ME. REV. STAT. ANN. tit. 5, §§ 4571, 4581, 4595, 4601 (2010); Minnesota, MINN. STAT. § 363A.02 (2009); New Jersey, N.J. STAT. ANN. §§ 10:5-9.1, -12.5, -12, -4 (West 2010; New Mexico, N.M. STAT. § 28-1-7 (2009); Oregon, OR. REV. STAT. § 659A.030 (2009); R.I. GEN. LAWS, §§ 28-5-6, 34-37-3, 11-24-2.1 (2009); Vermont, VT. STAT. ANN. tit. 21, §§ 495, 4503, 10403 (2009); Washington, WASH. REV. CODE § 49.60.030 (2009). There are, of course, variations among these laws including whether, for example, the laws add "gender identity," "gender identity and expression," or some variation of that language to the law as well as whether the law adds a new

comparable laws.[5] In addition, cities across the country have added gender identity and expression to municipal nondiscrimination ordinances.[6]

That said, transgender people—much like gay, lesbian, and bisexual people—still lack nondiscrimination protections under both federal and most states' laws in employment, housing, and public accommodations. This lack of protection is particularly apparent in the issue of bathroom access. Federal regulations require that all employers provide

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category of protected characteristics or modifies existing ones such as "sexual orientation;" *see, e.g.*, MINN. STAT. § 363A.03(44) (2009) (defining "Sexual orientation" as "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness"); ME. REV. STAT. ANN. tit. 5, § 4553(9-C) (2009) (defining "Sexual orientation" as "a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression"); *see also*, CURRAH & MINTER, *supra* note 1, at 41–44. Regardless of the approach, the goal of such laws is to ensure that anyone who is gender non-conforming in some way (or transgender) is protected by the laws' reach.

5. *See, e.g.*, An Act Relative to Gender-Based Discrimination and Hate Crimes, H.B. 1722, 185th Sess. (Mass. 2007); An Act Concerning Discrimination, H.B. 5723, 2008 Sess. (Conn. 2008). Much has already been written about why adding gender identity and expression to state laws is important to ensure that transgender people are protected against discrimination. While existing sex discrimination laws should and could protect many transgender people, see, e.g., Smith v. Salem, Ohio, 378 F.3d 566 (6th Cir. 2004); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000); Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000); Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008), historically many courts have read into sex discrimination laws an exclusion from the laws' protection. *See, e.g.*, Ulane v. E. Airlines, 742 F.2d 1081 (7th Cir. 1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748 (8th Cir. 1982); Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37 (Fall 2000). As a result, adding clear and explicit protections for transgender people has become an important part of transgender advocacy.

6. *See U.S. Jurisdictions with Laws Prohibiting Discrimination on the Basis of Gender Identity or Expression*, TRANSGENDER LAW & POLICY INST. (2010), http://transgenderlaw.org/ndlaws/index.htm#jurisdictions ((in reverse chronological order) Nashville, TN; Kalamazoo, MI; Broward, FL; Columbia, SC; Detroit, MI; Gainesville, FL; Hamtramck, MI; Kansas City, MO; Oxford, OH; Lake Worth, FL; Milwaukee, WI; Palm Beach County, FL; Saugatuck, MI; West Palm Beach, FL; Bloomington, IN; Cincinnati, OH; Easton, PA; Ferndale, MI; Hillsboro, OR; Johnson County, IA; King County, WA; Lansdowne, PA; Lansing, MI; Swarthmore, PA; West Chester, PA; Gulfport, FL; Indianapolis, IN; Lincoln City, OR; Northampton, MA; Albany, NY; Austin, TX; Beaverton, OR; Bend, OR; Burien, WA; Oakland, CA; Miami Beach, FL; Tompkins County, NY; Carbondale, IL; Covington, KY; El Paso, TX; Ithaca, NY; Key West, FL; Lake Oswego, OR; Monroe Co., FL; Peoria, IL; San Diego, CA; Scranton, PA; Springfield, IL; University City, MO; Allentown, PA; Baltimore, MD; Boston, MA; Buffalo, NY; Chicago, IL; Cook County, IL; Dallas, TX; Decatur, IL; East Lansing, MI; Erie County, PA; New Hope, PA; New York City, NY; Philadelphia, PA; Salem, OR; Tacoma, WA; Denver, CO; Huntington Woods, MI; Multnomah Co., OR; Rochester, NY; Suffolk County, NY; Atlanta, GA; Boulder, CO; DeKalb, IL; Madison, WI; Portland, OR; Ann Arbor, MI; Jefferson County, KY; Lexington-Fayette Co., KY; Louisville, KY; Tucson, AZ; Benton County, OR; Santa Cruz County, CA; New Orleans, LA; Toledo, OH; West Hollywood, CA; York, PA; Cambridge, MA; Evanston, IL; Olympia, WA; Pittsburgh, PA; Ypsilanti, MI; Iowa City, IA; Grand Rapids, MI; San Francisco, CA; Santa Cruz, CA; St. Paul, MN; Seattle, WA; Harrisburg, PA; Los Angeles, CA; Urbana, IL; Champaign, IL; Minneapolis, MN).

access to restrooms,[7] yet the dearth of federal gender-nondiscrimination protection permits employers to discriminate as to who can use which bathroom. In states without transgender-inclusive nondiscrimination laws, it is not uncommon for a transgender person to be forced to use a bathroom that is inconsistent with his or her gender identity—an experience this Article refers to as bathroom discrimination.[8] This treatment constitutes discrimination because it ignores the real and central element of a transgender person's identity—his or her gender identity—while respecting the gender identity of persons who are not transgender.

Even in states and cities with transgender-inclusive nondiscrimination laws, transgender people face significant barriers to equal bathroom access. In a 2002 survey conducted by the San Francisco Human Rights Commission, nearly 50% of transgender respondents reported harassment or assault in a public bathroom, notwithstanding California's transgender-inclusive legal protections. Because of this, the report concluded, "[M]any transgender people avoid public bathrooms altogether and can develop health problems as a result."[9] One respondent wrote:

> I have spent so many hours avoiding public multi-stall bathrooms that I have damaged my bladder and put pressure on my kidneys. The problem was a daily one. I'd think about where I was going,

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7. 29 C.F.R. § 1910.141(d)(2)(i) (2010) ("Lavatories shall be made available in all places of employment."). The history of bathroom sex segregation is summarily explained in C.J. Griffin, *Workplace Restroom Policies in Light of New Jersey's Gender Identity Protection*, 61 RUTGERS L. REV. 409, 414–15 (2009); *see also* Terry S. Kogan, *Transsexuals in Public Restrooms: Law, Cultural Geography and* Etsitty v. Utah Transit Authority, 18 TEMP. POL. & CIV. RTS. L. REV. 673, 685 (2009).

8. *See, e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224 (10th Cir. 2007) (upholding a ruling by the District of Utah that it was legally permissible to fire a transgender woman because "use of women's public restrooms by a biological male could result in liability"); Johnson v. Fresh Mark, Inc., 98 F. App'x 461, 461 (6th Cir. 2004) (upholding district court ruling that plaintiff had failed to state a claim for sex discrimination against employer who fired transgender female employee for refusing to use the men's restroom); *Sommers*, 667 F.2d at 748, 749 (upholding district court ruling that denial of bathroom access to a transgender employee followed by termination is "not within the ambit" of Title VII of the Civil Rights Act); Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp 284, 290 (E.D. Pa. 1993) (court granted defendant's motion to dismiss civil rights suit brought by transgender plaintiff who suffered discrimination through, among other things, denial of appropriate bathroom access); Hispanic AIDS Forum v. Estate of Bruno, 792 N.Y.S.2d 43, 54 (N.Y. App. Div. 2005) (holding that a landlord could refuse to renew a non-profit's lease because the non-profit's transgender clients used the restrooms in the building). Although New York does not include gender identity or expression in its civil rights law, courts have held for transgender plaintiffs in other contexts based on disability or sex discrimination claims. *See, e.g.*, Doe v. Bell, 754 N.Y.S.2d 846, 856 (N.Y. Sup. Ct. 2003).

9. TRANSGENDER LAW CENTER, PEEING IN PEACE, A RESOURCE GUIDE FOR TRANSGENDER ACTIVISTS AND ALLIES, 3 (2005), *available at* http://transgenderlawcenter.org/pdf/PIP%20Resource%20Guide.pdf.

> what bathrooms I'd have access to, how much I drank during the day, whether I'd be with people who could help stand guard . . . .[10]

Transgender people are forced out of employment and school because they are denied access to bathrooms. In *Goins v. West*, a transgender plaintiff in a civil rights lawsuit argued that she faced constructive termination because her employer refused to allow her to use the women's restroom.[11] Among other types of discrimination that transgender youth face, bathroom-based discrimination is one of the top forces pushing them to drop out of school.[12]

Bathroom discrimination is real and terrifying. Leslie Feinberg, a transgender activist and author, writes:

> We live under the constant threat of horrifying violence. We have to worry about what bathroom to use when our bladders are aching. We are forced to consider whether we'll be dragged out of a bathroom and arrested or face a fistfight while our bladders are still aching . . . . Human beings must use toilets.[13]

Feinberg describes the violence that transgender people face in the bathroom: "If I go into the women's bathroom, am I prepared for the shouting and shaming? Will someone call security or the cops? If I use the men's room, am I willing to fight my way out? Am I really ready for the violence that could ensue?"[14]

The harassment and violence from civilians is bad, but police brutality is often much worse.

> [P]olice officers often harass or abuse transgender and gender nonconforming people regardless of which sex-segregated bathroom they use. This harassment intensifies when coupled with the stereotyping of trans people as sexual predators. As such, the use of the 'wrong' bathroom . . . often results in arrests for crimes such as public lewdness, public obscenity, or public indecency. Refusing to comply with or simply questioning a police officer's direction as to which bathroom the individual must use can often lead to charges such as resisting arrest or disorderly conduct.[15]

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10. TRANSGENDER LAW CENTER, THE PROBLEM, *available at* http://transgenderlawcenter.org/trans/pdfs/SBAC%20Fact%20Sheet-lem%20handout.pdf.

11. Goins v. West Group, 635 N.W.2d 717 (Minn. 2001).

12. *See* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *1 (Mass. Super. Oct. 11, 2000) (school attempted to bar student from attending in clothes consistent with her gender identity and suspended her for using the women's restroom).

13. LESLIE FEINBERG, TRANS LIBERATION: BEYOND PINK OR BLUE 68 (1998).

14. *Id.* at 68–69.

15. Pooja Gehi, *Struggles from the Margins: Anti-Immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN'S RTS. L. REP. 315, 326 (2009).

While the situation is unacceptable today, in the past it was much worse. One guidebook for transgender people published in 1995 advised transgender people "to carry with [them] at all times a psychologist's letter . . . ."—like a passport in hostile territory—in case they were stopped by police.[16] According to Amnesty International, "Bathroom access issues become more of an issue with intersecting identities—people of color, homeless and young people are already under higher scrutiny."[17]

Activists have already organized significantly around this issue. At the University of California—Santa Barbara, a team of students, staff, and community members founded an organization called People In Search of Safe and Accessible Restrooms ("PISSAR") to lobby the school to make bathrooms safe and accessible for transgender and disabled people.[18] They were motivated by the fact that "[f]or those of us whose appearance or identity does not quite match the 'man' or 'woman' signs on the door, bathrooms can be the sites of violence and harassment, making it very difficult for us to use them safely or comfortably."[19] Activists have even set up a website, Safe2Pee.org, to "create a resource where people who do not feel comfortable with traditional public restrooms can find safe alternatives."[20]

B. Bathroom Discrimination Reflects Broader Animus

Restricting the ability to use bathrooms has long served as yet another way to marginalize minority and disempowered groups. As C.J. Griffin writes, discriminatory bathroom rules are "a tool of oppression used against many individuals and communities."[21] As Griffin points out, "[T]he lack of bathroom facilities has been an excuse to keep women out of areas traditionally dominated by men. For example, history suggests that women were only allowed into Yale Medical School after a female applicant's wealthy father donated money to build a women's restroom."[22] As for race, the South's notorious Jim Crow laws were designed to ensure white hegemony as much as to prescribe social norms. "Racially-segregated facilities taught both whites and blacks that certain

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16. SHEILA KIRK, M.D. & MARTINE ROTHBLATT, J.D., MEDICAL, LEGAL & WORKPLACE ISSUES FOR THE TRANSSEXUAL: A GUIDE FOR SUCCESSFUL TRANSFORMATION 114 (1995).

17. AMNESTY INT'L, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE IN THE U.S. 20 (2005), http://www.amnestyusa.org/outfront/stonewalled/report.pdf.

18. SIMONE CHESS, ET AL., *Calling all restroom revolutionaries!*, *in* THAT'S REVOLTING: QUEER STRATEGIES FOR RESISTING ASSIMILATION 216–17 (Matt Bernstein Sycamore ed., Soft Skull Press 2008).

19. *Id.* at 217.

20. SAFE2PEE.ORG, http://safe2pee.org (last visited March 2, 2010).

21. Griffin, *supra* note 7, at 410.

22. *Id.* at 420.

kinds of contacts were forbidden because whites would be degraded by the contact with the blacks . . . . [Often] in the workplace, blacks had to travel great distances to use the restroom, while white restrooms were generally just off the shop floor."[23]

Ratcheting up the rhetoric around bathroom discrimination is neither a contemporary phenomenon, nor has its exclusive focus or purpose been to marginalize transgender people. It began in a more opaque form with the movement opposing passage of a federal Equal Rights Amendment. The proposed Amendment, passed by both houses of Congress in 1972, would have added to the Constitution a provision stating, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

Although the ERA garnered significant support among the states, it ultimately came up three states shy of ratification (thirty-eight states being required) because of substantial efforts by its opponents. The most prominent critic and opponent of the ERA was Phyllis Schlafly, a conservative activist and founder of the Eagle Forum. Schlafly strongly pushed the bathroom argument to stir up fears about the impact of the ERA on gender norms. She also focused on the impact of the ERA on the military and on marriage.[24] As one pamphlet distributed by Schlafly's Eagle Forum stated: "ERA will not protect privacy between the sexes in hospitals, prisons, schools, or public accommodations."[25]

Many scholars and commentators today either ridicule the shared bathroom objection or marginalize its seriousness relative to the importance of having a sex-based nondiscrimination commitment.[26] Yet, the centrality of the bathroom objection to ERA opponents' arguments is clear. Historians acknowledge it, and in a 2007 article discussing efforts by members of Congress to reintroduce the ERA, the *Washington Post* characterized Schlafly's opposition as focusing on "women being drafted

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23. *Id.* at 424 (internal citations omitted).

24. JANE MANSBRIDGE, WHY WE LOST THE ERA (Univ. Chicago Press 1986).

25. EAGLE FORUM, ERA—DO YOU KNOW WHAT IT MEANS?, http://www.eagleforum.org/era/2003/ERA-Brochure.shtml (July 6, 2010).

26. MANSBRIDGE, *supra* note 24; Reva B. Siegel, *Constitutional Culture, Social Movement, Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1339 (2006) (referring to the current debate about the ERA as focusing on "some funny business about bathrooms and bras."); Martha Craig Daughtrey, *Women and the Constitution; Where we are at the End of the Century*, 75 N.Y.U. L. REV. 1, 23 (April 2000) (suggesting that the failure of the ERA did not significantly hurt women because "[w]hen Congress sent the equal rights amendment to the states for ratification in 1972, ERA opponents warned of dire consequences: co-ed bathrooms, women drafted into the military [and] the repeal of spousal support laws . . . . The ERA failed, but the consequences happened anyway. Unisex bathrooms are in college dorms around the country.").

by the military and . . . public unisex bathrooms."[27] Opponents of the ERA offered no explanation for their concern regarding shared restroom usage.[28] They relied, in much the same way as opponents of transgender nondiscrimination laws do, on the visceral reaction people had to the suggestion that norms around bathroom access might change.

While the federal ERA captured national attention, many states adopted local civil rights laws to prohibit discrimination on the basis of sex in employment, education, credit, housing, and public accommodations, among other areas. Some of these states, prompted by Schlafly's activism, included bathroom exceptions to their nondiscrimination laws.[29] Not one recorded case exists in any state—from before or after the passage of these laws—in which a plaintiff challenged the constitutionality of sex-segregated bathrooms under a state ERA. The existence of these statutory exceptions, however, speaks to the influence of Schlafly and others on the debate and the centrality of bathroom hysteria to that legislative development.[30]

C. Bathrooms as the Focus of Anti-Transgender Activism Today

While Schlafly presented fears of a unisex bathroom revolution where women would be forced to share space with men, subsequent conservative activists have narrowed the bathroom argument to focus pri-

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27. Juliet Eilperin, *New Drive Afoot to Pass Equal Rights Amendment*, WASH. POST, Mar. 28, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/03/27/AR2007032702357.html.

28. *See generally* FLORA DAVIS, MOVING THE MOUNTAIN: THE WOMEN'S MOVEMENT IN AMERICA SINCE 1960 390 (1999) (discussing types of arguments used in oppositions of the Equal Rights Amendment); DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 68–69 (1989) (discussing the traditional distinction maintained between the sexes).

29. For example, Rhode Island adopted a rule of interpretation at the time it passed a state law prohibiting sex discrimination explaining that "[n]othing contained in [the nondiscrimination laws] that refers to 'sex' shall be construed to mandate joint use of restrooms . . . by males and females." R.I. GEN. LAWS § 11-24-3.1 (2009). (There are no reported cases dealing with this law.) New Jersey is another state which when it added "sex" to its nondiscrimination laws, created an exemption from its laws for public accommodations that are usually single-sex. *See, e.g.*, N.J. REV. STAT. § 10:5-12(f)(1) (2010) ("nothing contained herein shall be construed to bar any place of public accommodation which is in its nature reasonably restricted exclusively to individuals of one sex, and which shall include but not be limited to any summer camp, day camp, or resort camp, bathhouse, dressing room, swimming pool, gymnasium, comfort station, dispensary, clinic or hospital, or school or educational institution which is restricted exclusively to individuals of one sex, provided individuals shall be admitted based on their gender identity or expression. . . ."). So too in New Mexico, state law exempts bathrooms from the sex discrimination laws. N.M. STAT. § 28-1-9(E) (2010). (There are no reported cases dealing with this law.) Minnesota also has a bathroom exception to the public accommodations provision of the sex discrimination law. MINN. STAT. § 363A.24 (2010). Notably, all four of these states have since added laws prohibiting discrimination based on gender identity and expression that make no reference to the earlier bathroom exceptions.

30. Martha F. Davis, *The Equal Rights Amendment: Then and Now*, 17 COLUM. J. GENDER & L. 419, 445–46 (2008) ("An extensive search has revealed no case brought under any state ERA challenging the norm of public single-sex bathrooms.").

marily on transgender people. That focus has intensified over time as more and more states have added gender identity and expression as explicitly protected characteristics.

In Rhode Island, for instance, adding gender identity and expression to the nondiscrimination law raised little debate at all and included no specific emphasis on bathrooms. There was one public hearing on the bill; the discussion focused almost entirely on legislators' confusion as to why adding sexual orientation back in 1995 was insufficient to cover transgender people. The scant legislative history reflects that "[g]ender identity and expression" was added to the public accommodations nondiscrimination law in 2001 to "close [the] loophole" within the then-current civil rights laws that failed to explicitly protect transgender people from discrimination by extending to transgender people "the same basic rights to housing, employment and public access afforded to other members of the community."[31]

Over time, however, objections based on bathroom concerns have gained strength. Recent experiences advocating for such legislation in Connecticut and Massachusetts reveal that a major point of opposition to transgender equality laws focuses on the impact such laws would have on bathroom usage.[32]

In Massachusetts, activists closely modeled their strategy to add gender identity to the nondiscrimination law on the Rhode Island experience. The language of the bills is nearly identical. In the Massachusetts experience, the first public hearing was before the Joint Committee on the Judiciary. The experience of that public hearing, however, was markedly different from the one in Rhode Island. In Massachusetts, dozens of transgender people poignantly testified about their experiences of discrimination across a range of issue areas, including employment, education, public accommodations, public safety, and others.

The opposition, however, painted the entire pro-transgender equality effort as "the bathroom bill," and focused on that almost exclusively. In a publication titled "Yes, HB1728 is a 'Bathroom Bill,'" and with a heading reading, "Protect Women and Children," the Massachusetts Family Institute ("MFI") claimed that under the law.

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31. Press Release, The Legislative Press and Public Information Bureau, Bill Would Extend Civil Rights to Transgendered Persons (May 2, 2001), http://www.rilin.state.ri.us/leg_press/2001/may/Ajello%20civilrights.htm (quoting Representative Edith H. Ajello, sponsor of the bill that ultimately enacted 2001-H5920A).

32. Amy Contrada, *The Coming Nightmare of a Transsexual Rights and Hate Crimes Law in Massachusetts: Why Bill H1722 Must Be Defeated; Part 3: Public Accommodations*, MASSRESISTANCE (2008), http://www.massresistance.org/docs/govt08/tran_law_study/part3.html.

> any man can legally gain access to facilities reserved for women and girls by indicating, verbally or non-verbally, that he inwardly feels female at the moment. There is no way to distinguish between someone suffering from "Gender Identity Disorder" and a sexual predator looking to exploit this law. This is the dangerous reality of this bill.[33]

MFI set up a website, NoBathroomBill.com, featuring a YouTube video of a threatening-looking man following a young girl into a bathroom.[34] It attempted to deflect allegations of anti-transgender bias by stating, "We believe that transgender persons should enjoy the same legal protections as other citizens and be free of harm or harassment[,] . . . but invading everyone else's privacy and safety is going too far."[35] Yet, the underlying message came through. One speaker in opposition to the bill stated,

> I know from teaching young children for so many years that they are so innocent. Seeing an adult, or older child dressed very differently, especially in and around the school, would be extremely frightening to many young children, not to mention the comfort level of other adults working in the school.[36]

According to Kris Mineau, the leader of MFI, upon adoption of the proposed bill, "[n]othing would prevent a sexual predator from pretending that he is confused about his sex to gain access to vulnerable women and children in public restrooms. . . ."[37] Opposition by the organization MassResistance focused similarly on objections to bathroom usage but characterized the impact of the law in even more extreme ways. According to a report the organization prepared in opposition to the bill, "[t]here will also be demands for gender-neutral single-person restrooms in all publicly accessible places, already the rage at colleges across the country—a very expensive add-on."[38] Opponents of transgender equality

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33. Legislative Brief, Mass. Family Inst., Yes, HB 1728 is a Bathroom Bill (2008), http://www.nobathroombill.com/resources/mfilegislatorbrief02.htm.

34. No Bathroom Bill, *NoBathroomBill.com Ad #1*, YOUTUBE (MAR. 17, 2009), http://www.youtube.com/watch?v=GWDA4IGyY-s.

35. *Frequently Asked Questions*, NO BATHROOM BILL http://www.nobathroombill.com/faqs.htm (last visited March 3, 2010).

36. Deborah Furtado, Remarks at the Press Conference at Great Hall, State House, Boston, Mass. (April 8, 2009), http://www.nobathroombill.com/resources/furtadoremarks.htm.

37. Kris Mineau, President, Mass. Family Inst., Testimony Before the Judiciary Committee in Opposition to HB 1728 (July 14, 2009), http://www.nobathroombill.com/judiciaryhearing.htm#mineau (last visited July 4, 2010).

38. Contrada, *supra* note 32.

have used similar arguments across the country to fight bills in Maryland,[39] Colorado,[40] Michigan,[41] and Florida.[42]

Bathroom-centered objections to transgender rights have appeared at the federal level as well. In response to the news that President Obama had come out in favor of a transgender-inclusive Employment Nondiscrimination Act, right-wing religious organization Americans for Truth About Homosexuality, brainchild of long-time right-wing activist Peter LaBarbera, released a press statement asking, "So will an Obama Administration allow these big-boned men in female clothing to use ladies' restrooms in federal buildings? What will a President Obama do to protect the right to privacy of female federal workers who don't want men wearing dresses—with male genitalia—sharing their women's restroom?"[43]

What is clear from all of these examples is that opponents use a predictable set of themes to argue broadly against transgender equality as much as to focus on any real concerns about bathroom access or privacy. As we discuss below, the same themes appear not only in the bathroom discrimination case law, but also in the cross-dressing cases.

III. BATHROOM DISCRIMINATION: ANALYSIS OF THE CASE LAW

A small handful of published cases discuss the rights of transgender people to access the appropriate bathroom. Just as in the cross-dressing cases analyzed in the next section, the tropes are easily categorized. The courts and defendants justify denying transgender people access to a

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39. Montgomery County, Md., Bill 23-07, Maryland Gender Identity Nondiscrimination Law (Nov 13, 2007) (enacted); H.B. 474/S.B. 566 Human Relations—Sexual Orientation and Gender Identity—Antidiscrimination, HB 474/SB 566, 426th Sess. (Md. 2009).

40. S.B. 08-200, 2008 Leg., (Co. 2008) (enacted). Focus on the Family targeted Colorado's gender identity bill, declaring in a flier that "Colorado Just Opened its Public Bathrooms to Either Sex!" accompanied by a picture of a scared young girl cowering in a bathroom stall with a large man nearby. FOCUS ON THE FAMILY ACTION, LEAFLET, COLORADO JUST OPENED ITS PUBLIC BATHROOMS TO EITHER SEX! (undated) (on file with author).

41. Kalamazoo, Mich., Ordinance 1856, Sexual Orientation and Gender Identity Nondiscrimination Law (Nov. 3, 2009). The organization Kalamazoo Citizens Voting No to Special Rights sent out a mailer stating: "[O]ne could declare himself to be of the opposite sex and use facilities like restrooms, locker rooms, and showers . . . . 'Gender Identity' makes it legal for anyone to declare himself to be any sex he chooses at any time." KALAMAZOO CITIZENS VOTING NO TO SPECIAL RIGHTS, MAILER, IS THERE A MAN IN YOUR DAUGHTER'S BATHROOM? (2009) (on file with author).

42. Gainesville, Fla., Ordinance 051225, Gender Identity Nondiscrimination Law (Jan. 28, 2008). *See also*, Citizens for Good Public Policy, *Citizens for Good Public Policy—Commercial*, YOUTUBE (June 17, 2008), http://www.youtube.com/watch?v=ExGBlXKRrYs (last visited July 4, 2010).

43. Press Release, Americans for Truth About Homosexuality, Will Federal Female Employees Be Safe from Cross-Dressing Men Using Ladies' Restrooms in the Obama Administration? (Nov. 10, 2008), http://americansfortruth.com/news/will-federal-female-employees-be-safe-from-cross-dressing-men-using-ladies%E2%80%99-restrooms-in-the-obama-administration.html.

bathroom consistent with their gender identity, even in states where such discrimination is expressly prohibited, by (1) some generalized fear of crime; (2) the need to prevent gender "fraud," (3) heteronormativity; and (4) a social need to enforce sex stereotypes.

Most importantly, in every case denying a transgender person's right to access the bathroom consistent with the person's gender identity, the logic of discrimination easily extends to other legal protections for transgender people and threatens to undermine the purpose of the laws. We discussed above how nondiscriminatory bathroom access is a fundamental health need. Here, we show how it is also a crucial legal right and that those who seek to deny it also seek to deny transgender people equality in a range of contexts, including employment.

A. Preventing Fraud and Crime

Concerns over the possibility of fraud and crime are framed in a variety of ways by defendants in the bathroom cases. Whether as a matter of safety or privacy, the underlying message emerging from these cases is that transgender people are perceived to be sexually threatening. In *Etsitty v. Utah Transit Authority*, the defendant argued, "Women have legitimate concerns about privacy and safety underlying their desire not to share restrooms, showers or dressing rooms with men, which are not motivated by animus against men and which do not result in societal disadvantage to men."[44] The defendant, a public-transportation provider in Utah, also argued that allowing the plaintiff to use the women's restroom would interfere with its ability "to maintain an image of professionalism and of a safe environment for [its] customers."[45] The defendant stated that it had a "legitimate reason to be concerned that women may be upset, offended, embarrassed or frightened by a biological male with male genitalia using the same women's restroom," ignoring the fact that the plaintiff, a transit worker, presented as female.[46] In another case, *Sommers v. Budget Marketing*, the court stated that while "[w]e are not unmindful of the problem [the plaintiff] faces[,] . . . [the defendant] faces a problem in protecting the privacy interests of its female employees."[47] Even in the absence of evidence to support the argument, the court held for the defendant.

A more interesting argument is that allowing a transgender person to use the right bathroom could incite others to violence. This echoes the

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44. Brief of Appellees Utah Transit Authority and Betty Shirley at 32, Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007) (No. 05-4193).

45. *Id.* at 27.

46. *Id.* at 31–32.

47. Sommers v. Budget Mktg., 667 F.2d 748, 750 (8th. Cir. 1982).

mindset that queer people are to blame when they are attacked by others out of panic and ignorance.[48] In *Cruzan v. Minnesota Public School System*, the court held that a school district had not violated a non-transgender female teacher's rights by allowing a transgender female to use the bathroom.[49] The defendants in *Etsitty* distinguished their situation from that faced by the complainants in *Cruzan* by arguing that they were "concerned about members of the general public over whom it has no control, as opposed to coworkers such as Ms. Cruzan, who can be trained and informed."[50] In a Maine case, the defendant made a similar argument, stating that "letting complainant use the female restroom would potentially cause an altercation and involve police."[51] Of course, the defendants ignored the very real safety risks involved in forcing a female-identified person to use the men's room and had no data upon which to rely to advance their arguments.

B. Enforcing Gender Norms, Discouraging Homosexuality

The importance of maintaining gender and sexuality norms also looms over many of the bathroom decisions. Several courts treat bathroom access for transgender people as a bridge too far, after which all reasonable gender-based restrictions would fall. In *Etsitty*, a transgender employee of the Utah Transportation Authority brought federal discrimination claims against her employer for unlawful termination. The defendants admitted that "at the time of the termination, [the Utah Transportation Authority] had received no complaints about Ms. Etsitty's performance, appearance, or restroom usage," yet they fired her in anticipation of such a reaction.[52] The defendants argued that holding in favor of a transgender person's right to access the correct bathroom would be like having "a federally protected right for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels, or for female ditch diggers to strip to the waist in hot weather."[53]

The result in *Etsitty* highlights the degree to which bathroom access is central to transgender equality. Of course, some women, transgender and non-transgender, *do* seek to wear dresses, nail polish, and high heels. The defendants in *Etsitty* were not only arguing against transgender

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48. *See* Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 133 (1992) (arguing that "judges should hold as a matter of law that a homosexual advance is not sufficient provocation to incite a reasonable man to kill").

49. Cruzan v. Minn. Pub. Sch. Sys., 165 F. Supp. 2d 964 (D. Minn. 2001).

50. Brief of Appellees, *supra* note 44, at 32.

51. ME. HUMAN RIGHTS COMM'N, INVESTIGATOR'S REPORT, PA08-0212 3 (April 29, 2009) (on file with author).

52. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1219 (10th Cir. 2007).

53. Brief of Appellees, *supra* note 44, at 32.

people using the bathroom, but against any sort of protections for transgender women in the workplace. Moreover, the language of "mincing" and speaking in a feminine way calls for employers to retain the right to discipline and terminate non-masculine men, gay and non-gay. Not surprisingly, in Utah, the state in which this case was brought, gay men of any gender expression are denied protections.

The *Etsitty* defendants also argued against the plaintiff's claim that termination based on bathroom access is unconstitutional sex-stereotyping prohibited under the U.S. Supreme Court's holding in *Price Waterhouse v. Hopkins*.[54]

> [I]f something as drastic as a biological man's attempt to dress and appear as a woman and use women's restrooms is simply a failure to conform to the male stereotype, and nothing more, then there is no social custom or practice associated with a particular sex that is not a stereotype. And if that is the case, then any male employee could dress as a woman, use female restrooms, shower rooms and locker rooms, and any attempt by the employer to prohibit such conduct would constitute sex stereotyping in violation of Title VII.[55]

The brief also argued that "[w]e live in a relatively conservative area and I think there are expectations of the customer in how a [public transit] employee is going to behave, and if a customer sees a bus operator entering a female restroom one day and a male restroom another day, that can be pretty disconcerting."[56] This argument, along with the bridge too far doomsday predictions addressed above, precisely echo the Schlafly-style hyperbole of ERA opposition.

Despite the contentions in the defendants' briefs, several of the decisions dealing with bathroom discrimination fail to discuss the defendants' reasoning for restricting transgender people's access. It is treated either as a point of common sense or a matter meriting no discussion. In one case, the court noted, without commentary, that the plaintiff's "misrepresentation led to a disruption of the company's work routine in that a number of female employees indicated they would quit if [the plaintiff] were permitted to use the restroom facilities assigned to female personnel."[57] Their motivation for quitting was not even addressed. In another

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54. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In that case, "[t]he Court held that evidence of sex stereotyping is 'legal[ly] relevan[t]' in the context of Title VII," and that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." Ilona Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 572 (2007).

55. Brief of Appellees, *supra* note 44, at 20.

56. *Id.* at 27.

57. Sommers v. Budget Mktg., 667 F.2d 748, 748–49 (8th Cir. 1982).

case, the court merely stated that defendants prohibited the transgender plaintiff from using the bathroom, ignoring why they would take this tack.[58] The same occurred in an Ohio case, in which the plaintiff employee who had presented as female for ten years was told to use the men's room because she had not changed the gender marker on her driver's license, which required evidence of a course of surgery.[59]

C. Rationales for Denying Access Despite Transgender-Inclusive Nondiscrimination Laws

The success of these common rationales for denying bathroom-based discrimination cases is most disturbing, perhaps, in those states with transgender-inclusive nondiscrimination laws. In those instances, the same arguments—the dangerousness of transgender people and the importance of preserving gender norms—figured prominently, notwithstanding the settled state policy reflected in the adoption of laws specifically enumerating the characteristic of gender identity or gender expression as protected.

The most notorious of these cases is *Goins v. West Publishing*, a Minnesota Supreme Court decision. In 1997, Julie Goins began employment with West Publishing in its Rochester, New York facility.[60] Consistent with her female gender identity, Ms. Goins used the women's restroom at work without any problems from coworkers.[61] It was not until she transferred to West's Minnesota facility later that year that she began to have trouble. During a pre-relocation visit, several of Ms. Goins's soon-to-be coworkers complained to their supervisors about her use of the women's restroom.[62] On the morning of her first day of work at the Minnesota facility, the director of human resources informed Ms. Goins that she could not use the women's restroom facility.[63] Ms. Goins attempted to negotiate with the company over their newly articulated policy that required restroom use according to what the company determined to be a person's "biological gender." But after a short time and being threatened with "disciplinary action if she continued to disregard the restroom use policy," Ms. Goins tendered her resignation, explaining that the company policy was hostile to her and caused her undue stress.[64]

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58. Dobre v. Nat'l R.R. Passenger Corp. (Amtrak), 850 F. Supp. 284, 290 (E.D. Pa. 1993).
59. Johnson v. Fresh Mark, Inc., 98 Fed. App'x 461, 461 (6th Cir. 2004).
60. Goins v. West Group, 635 N.W.2d 717, 721 (Minn. 2001).
61. *Id.*
62. *Id*.
63. *Id*.
64. *Id.*

Despite being offered a promotion and substantial salary increase, she left employment with West.

Ms. Goins filed an action against West alleging constructive termination. She claimed both that the policy itself discriminated against her impermissibly and that the conduct of West employees had created an unlawful hostile work environment.[65] Ms. Goins's claim of discrimination was grounded in Minnesota's prohibition against discrimination on the basis of "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."[66] Her claim was that the policy that required restroom use based on "biological gender" was precisely the type of adverse treatment proscribed by the law. The Minnesota Court of Appeals agreed with her seemingly straightforward analysis, finding that Ms. Goins had stated a prima facie case of direct evidence of discriminatory motive by showing that West's policy denied her the use of the female restroom facility "based on the inconsistency between her self-image and her anatomy."[67]

The Minnesota Supreme Court, however, disagreed and granted West's motion for summary judgment.[68] According to the Minnesota Supreme Court, notwithstanding the language of the state law protecting against adverse treatment based on the inconsistency of self-image and maleness or femaleness, "where financially feasible, the traditional and accepted practice in the employment setting is to provide restroom facilities that reflect the cultural preference for restroom designation based on biological gender."[69] The court went on to explain that "absent more express guidance from the legislature," it would not undermine the employer's ability to create a workplace restroom policy that reflects what it perceived as widely enforced cultural and social practices.[70] In other words, social norms trumped legislative language.

Notably, the court's analysis regarding the relationship between social norms and the legislative language cited only one case—one that actually dismissed the hostile work environment claims brought by several teachers objecting to a transgender colleague's use of the female restroom at a school.[71] The court offered no other support in case law, le-

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65. *Id.*

66. *Id*. at 722 (citing MINN. STAT. § 363.03(1)(2)(c) (2000)). Under Minnesota law, "sexual orientation" is defined to include the more common categories of "gender identity and expression." MINN. STAT. § 363A.03(44) (2004).

67. *Goins*, 635 N.W.2d at 723.

68. *Id.* at 726.

69. *Id*.

70. *Id.* at 723.

71. Cruzan v. Special Sch. Dist. No. 1, No. 31706 (Dep't of Human Rights Aug. 26, 1999); *rev'd by* Cruzan v. Minn. Public Sch. Sys., 165 F. Supp. 2d 964 (D. Minn. 2001) (granting defendant school district's motion for summary judgment, holding that female teacher had failed to establish

gal doctrine, or even canons of construction for its analysis. Making the analysis even more questionable is the fact that Minnesota's nondiscrimination law, well prior to including transgender people within its purview, had an express exclusion to the sex discrimination law for restrooms.[72] Apparently, the court simply ignored that exclusion and any relevant legislative history and found it more appropriate to deny the claim by imagining how a legislature that never was asked to address the issue would have addressed it if asked.

In the same year as the *Goins* decision, however, a federal district court in *Cruzan v. Minnesota Public School System* held as a matter of Minnesota law that allowing a transgender person to use a gender-concordant bathroom did not create a hostile work environment for an anti-transgender coworker.[73] The American Center for Law and Justice, a religious conservative public-interest law firm, brought the case on behalf of a public school teacher.[74] The teacher argued that permitting a transgender woman to use the women's restroom violated her religious freedom and created a hostile work environment.[75] The court rejected both of these claims, holding that "plaintiff fail[ed] to show that allowing Davis to use the female faculty restroom has created a working condition that rises to the level of an abusive environment. In fact, Cruzan acknowledges that she did not even notice Davis's use of this restroom for several months."[76] The federal court distinguished *Cruzan* from the facts in *Goins* because "unlike the plaintiff in *Goins*, Cruzan [the non-transgender colleague who filed suit] has a choice of restrooms and is not being *denied* access to any workplace facility on the basis of her gender."[77]

Unfortunately, *Cruzan* has been the exception rather than the rule. The effects of *Goins* have been felt beyond the borders of Minnesota. New York purports to protect transgender people under both disability and sex discrimination laws.[78] Yet, despite that, in one New York case,

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religious discrimination or hostile work environment due to school allowing male-to-female transgender teacher to use the women's restroom).

72. MINN. STAT § 363A.24(1) (2004).

73. *Cruzan*, 165 F. Supp. 2d at 968–69.

74. *Id.* at 965. The American Center for Law and Justice website favorably cites a news report declaring that it has "'led the way' in Christian legal advocacy." *Welcome from Jay Sekulow*, AMERICAN CENTER FOR LAW AND JUSTICE, http://www.aclj.org/About/ (last visited July 5, 2010).

75. *Cruzan*, 165 F. Supp. 2d at 966.

76. *Id.* at 969.

77. *Id.*

78. N.Y. EXEC. LAW § 296 (2010). *See* Rentos v. OCE-Office Sys., 1996 WL 737215 (S.D.N.Y. 1996) (holding transgender employee stated valid claim of sex discrimination under New York State Human Rights Law); Doe v. Bell, 754 N.Y.S.2d 846 (2003) (holding that "GID is a disability [for purposes of] the State Human Rights Law" requiring reasonable accommodation).

the court found the *Goins* ruling "instructive," and held that "the defendants' designation of restroom use, applied uniformly, on the basis of 'biological gender,' rather than biological self-image, was not discrimination."[79] The court reasoned that "at this juncture, the only discernible claim set forth in the complaint is that plaintiff's transgender clients were prohibited from using the restrooms not in conformance with their biological sex, as were all tenants."[80] The defendants stated that they "agree[d] that discrimination against transsexuals is abhorrent" but argued that "this case is only about bathrooms and is a case that deals with a situation which is dangerous to the public."[81] The defendants dismissed the argument in favor of allowing transgender people equal bathroom access as an "absurdity," saying that "there will be testimony [at trial] indicating the use by anatomical male transsexuals of women's bathrooms, which were also being used by [five, six, and seven year-old girls] at the same time."[82] The case ultimately settled out of court in 2005.[83]

In Maine, by way of contrast, the state human rights commission has consistently rejected the *Goins* line of reasoning and protected the rights of transgender people to access the bathroom. One case dealt with the right to access a bathroom in a restaurant. The transgender complainant challenged respondent restaurant's policy prohibiting her from using the women's restroom.[84] The restaurant defendant proffered the familiar litany of arguments, asserting that allowing a transgender woman to use the restroom (1) invaded the "privacy" of biological women; (2) posed a "danger [to] young girls and children using the women's restroom" of "being exposed to a man" because "there is a possibility of someone's child peeking into a stall"; (3) had possibility to "cause an altercation and involve police"; and (4) opened "the door for a possible sex predator using the bathroom of the opposite sex on purpose."[85] The restaurant's solution was for the transgender woman—who presented in a normatively feminine way—to use the men's room. The commission rejected the argument and held for complainant.[86]

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79. Hispanic AIDS Forum v. Estate of Bruno, 792 N.Y.S.2d 43, 47 (N.Y. App. Div. 2005).

80. *Id.*

81. Reply Brief for Defendant-Appellant at 1, Hispanic AIDS Forum v. Bruno, 792 N.Y.S.2d 43 (N.Y. App. Div. 2005) (No. 3820).

82. *Id.* at 2.

83. *See* Hispanic AIDS Forum v. Bruno, ACLU, March 16, 2005, http://www.aclu.org/lgbt-rights_hiv-aids/hispanic-aids-forum-v-bruno.

84. *See* ME. HUMAN RIGHTS COMM'N, *supra* note 51, at 3.

85. *See* ME. HUMAN RIGHTS COMM'N, *supra* note 51, at 3.

86. *See* ME. HUMAN RIGHTS COMM'N, *supra* note 51, at 3. The complainant in that case has since filed a court action against the restaurant whose motion to dismiss the case was recently denied.

The foregoing cases illustrate the power of the commonly-used arguments against transgender people's nondiscriminatory access to restrooms, even in states where gender expression is purportedly protected.

IV. CROSS-DRESSING LAWS: ANALYSIS OF THE HISTORY AND CASE LAW

The same types of arguments used in bathroom access cases—preventing crime and fraud, discouraging homosexuality, and enforcing gender norms—were also all significant in the history and case law surrounding the issue of cross-dressing. Unlike the bathroom cases, however, the courts almost uniformly struck down the cross-dressing bans and in no instance sustained their use against a transgender defendant. Their reasoning offers another set of arguments against bathroom discrimination, as we discuss in the final section of this Article.

A. History of Cross-Dressing Laws

Sumptuary codes regulating dress based on sex, class, religion, and race date back to the Middle Ages. As discussed by I. Bennett Capers in his article *Cross-Dressing and the Criminal*, "many of these laws served to inscribe and police social boundaries."[87] In Elizabethan England, the Queen "issued more royal brevets concerning dress than any prior monarch." A royal proclamation in 1597 contained "dress prohibitions, from materials for headdresses, netherstocks, jerkins, hose, and doublets, depending on whether one was an earl or count or gentleman or had an annual income of 500 marks or more, or fell in some station in between."[88]

Sumptuary laws also played a role in marking racial and religious groups.

> A 1430 Venetian order, for example, mandated that all Jews identify themselves as Jewish by wearing on their chests yellow circles of cord; Rome required that male Jews wear red tabards and female Jews red overskirts. In [the U.S.], sumptuary laws limited the type of clothing that could be worn by black slaves. South Carolina's slave code, for example, mandated that slaves could only wear negro cloth, duffelds, coarse kearsies, osnabrigs, blue linen, checked linen or coarse garlix or calicoes, checked cottons, or scotch plaids, not exceeding ten shillings per yard for the said checked cottons, scotch plaids, garlix or calico.[89]

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87. I. Bennett Capers, *Cross-Dressing and the Criminal*, 20 YALE J.L. & HUMAN. 1, 7 (2008).
88. *Id.*
89. *Id.* at 8.

The first American cross-dressing laws, however, arose

> [b]etween 1850 and 1870, just as the abolitionist movement, then the Civil War, and then Reconstruction were disrupting the subordinate/superordinate balance between blacks and whites, just as middle class white women were demanding social and economic equality, agitating for the right to vote, and quite literally asserting their right to wear pants, and just as lesbian and gay subcultures were emerging in large cities, jurisdictions began passing sumptuary legislation which had the effect of reifying sex and gender distinctions.[90]

Twenty-eight cities passed cross-dressing laws in the nineteenth century and an additional twelve passed laws in the twentieth century, with the most recent passed by Cincinnati in 1974.[91] In the nineteenth century, this "wave of local legislation . . . represented a new development," according to historian Susan Stryker.[92] "Cities of every size and in every part of the country adopted gender-normative sumptuary rules."[93] And into the 1970s and 1980s, they were routinely enforced. The city of Houston's cross-dressing law, for instance, resulted in the arrests of fifty-three people in 1977.[94]

Though these laws were ultimately used to punish people for their gender expression, in many states this was not the legislative intent. In *People v. Archibald*, the dissenting judge identified the anti-criminality roots of the 1845 New York cross-dressing law. "[T]he original section," he pointed out, "was enacted as part of an over-all policy aimed at ending the anti-rent riots, an armed insurrection by farmers in the Hudson Valley." The farmers,

> while disguised as "Indians," murdered law enforcement officers attempting to serve writs upon the farmers . . . . [A]s part of their costumes, [they] wore women's calico dresses to further conceal their identities . . . . Indeed, males dressed in female attire for purposes other than discussed above were not even considered by the Legislature adopting the section.[95]

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90. *Id. See also* SUSAN STRYKER, TRANSGENDER HISTORY 31 (2008). See also Michelle Migdal Gee, Annotation, *Validity of Law Criminalizing Wearing Dress of Opposite Sex*, 12 A.L.R. FED. 1249 (1982) for a summary of relevant cases.

91. For table, *see* STRYKER, *supra* note 90, at 32–33 (citing Clare Sears, A Dress Not Belonging to His or Her Sex: Cross-Dressing Law in San Francisco, 1860–1900, (2005) (unpublished Ph.D. dissertation, Sociology Department, Univ. of Cal.—Santa Cruz) (on file with author) (based on data from WILLIAM ESKRIDGE, GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (1997)).

92. STRYKER, *supra* note 90, at 33.

93. ESKRIDGE, *supra* note 91, at 27.

94. Doe v. McConn, 489 F. Supp. 76, 79 (S.D. Tex. 1980).

95. People v. Archibald, 296 N.Y.S.2d 864 (N.Y. App. Term 1968).

In other states, however, gender norms did motivate the passage of these laws. First, as women entered the public square, demands for more comfortable and less restrictive women's clothing arose. "Nineteenth century antifeminist opinion, which saw in feminism a threatened loss of distinction between men and women, considered dress reform to be tantamount to cross-dressing," echoing the opposition of Phylis Schlafly and her cohorts a century later.[96]

The desire to keep women "in their place" and prevent them from assuming the privileges and status of men stemmed from the archaic sumptuary laws that regulated dress in Europe and pre-Revolutionary America. These laws "were designed to regulate dress in order to mark out as visible and above all legible distinctions of wealth and rank within a society undergoing changes that threatened to blur or even obliterate such distinctions."[97] Since colonial times, laws barred people from wearing clothes signifying certain professions or social classes and barred people from attempting to present themselves as a different race.[98]

Second, cities passed cross-dressing laws to deal with the post-war stirrings of gay liberation. In Chicago, they termed it "sexual deviance"; it was called "illegal deception" in California and New York.[99] In Chicago, the law was part of a broader legal effort to "urg[e] proper sex roles by proscribing dress, reading material, and behavior . . . as part of a general rule against public lewdness and indecency," that is, to regulate homosexuality.[100] There was a widespread perception among gay men and lesbians that they needed to avoid any sort of cross-dressing in order to steer clear of violating the law for wearing too few gender-appropriate garments.[101] One author writes that there was an "understanding among gay men and lesbians in the 1950s and 1960s that they were subject to arrest unless they had on three garments appropriate to their gender."[102] The cross-dressing laws, even when they were not borne out of the desire to enforce gender norms, functioned to keep gays and lesbians in fear of not conforming.

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96. STRYKER, *supra* note 90, at 35.

97. Jessica A. Clarke, *Adverse Possession of Identity: Radical Theory, Conventional Practice*, 84 OR. L. REV. 563, 597 (2005) (citations omitted).

98. STRYKER, *supra* note 90, at 35.

99. ESKRIDGE, *supra* note 91, at 27.

100. *Id.* at 28. *See, e.g.*, CHI., ILL., CHICAGO MUN. CODE §192-8 (prohibits a person from wearing clothing of the opposite sex with the intent to conceal his or her sex); COLUMBUS, OHIO, COLUMBUS MUN. CODE §2343.04 (prohibiting person from appearing in public "in a dress not belonging to his or her sex"). *See also* People v. Simmons, 357 N.Y.S.2d 362, 365 (N.Y. Crim. Ct. 1974) ("Cross-dressing is proscribed by the laws of several states and municipalities.").

101. Clarke, *supra* note 97, at 593–94 (citing Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1551 n.85 (1993)).

102. *Id.* at 594.

B. Cross-Dressing Case Law

As the courts began to strike down the cross-dressing laws as unconstitutional, they rejected the four justifications—to be later echoed in the bathroom cases—put forward by the laws' defenders: (1) concerns about fraud; (2) crime detection; (3) discouragement of overt homosexuality; and (4) maintaining widely held social norms of appropriate gendered expression. Not all of these arguments appear in each case, but these four categories neatly encapsulate the varieties of rhetoric employed by anti-transgender lawyers and activists.

1. Preventing Fraud and Crime

Defenders of cross-dressing laws argued that the cross-dressing laws were needed to "protect citizens from being misled or defrauded," "to aid in the description and detection of criminals," and "to prevent crimes in washrooms."[103] In an unpublished case brought in Fort Worth, Texas, the court held, in contrast, that a cross-dressing "ordinance [was] invalid unless the impersonation is done for fraud."[104] The court refused to see in cross-dressing an implied fraud, as the law's defenders urged.[105] In that instance, police visited a local gay bar "on a routine check" and arrested seven of its biologically male patrons for wearing evening gowns.[106] They were charged, according to a contemporary news account, "with impersonating females under a city ordinance that makes it illegal for a man to wear clothing 'not appropriate to his sex.'"[107] The judge remarked that since he usually dismisses such cases, he couldn't understand why the police continue[d] to use the ordinance to harass people."[108]

Another court held that the "preventing crime" justification was constitutionally permissible, yet held that the ordinance was unconstitutional as applied to a transgender person, acknowledging that gender identity was central to the person's public and private sense of self, re-

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103. Chicago v. Wilson, 389 N.E.2d 522, 532 (Ill. 1978). In *Wilson*, "the defendants testified that they were transsexuals, and were, at the time of their arrests, undergoing psychiatric therapy in preparation for a sex reassignment operation. As part of this therapy, both defendants stated, they were required to wear female clothing and to adopt a female life-style. Kimberley stated that he had explained this to the police at the time of his arrest. Both defendants said they had been transsexuals all of their lives and thought of themselves as females." *Id.* at 523. *See also* Doe v. McConn, 489 F. Supp. 76, 80 (S.D. Tex. 1980).

104. *Fort Worth Judge Raps Drag Arrests*, ADVOCATE, Dec. 19, 1973, at 14.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

gardless of anatomy or physiology.[109] In that case, the court held "common sense and experience discloses that this ordinance has a real and substantial relation to the public safety and general welfare. There are numerous subjects who would want to change their sex identity in order to perpetrate crimes of homicide, rape, robbery, assault, etc."[110] The court cited no studies, case law, or other authority for this assertion. Notably, however, no fraud concern could support the law's application to a transgender person whose dress and appearance reflected her female gender identity.[111]

2. Enforcing Gender Norms

Other proponents of the cross-dressing prohibitions argued that enforcing gender norms was necessary to protect the public peace. In a transphobic iteration of the "she was asking for it" argument, lawyers argued in *Mayes v. Texas* that "[a]n ineffective [cross-gender] disguise may engender cat-calls and slurring remarks leading to a breach of the peace. An efficient disguise could lead to trouble after an acquaintance is formed with the disguise and the true sex is disclosed when the friendship becomes amorous."[112] In another case, the city's attorneys described the enforcement of gender norms as an effort "to prevent inherently antisocial conduct which is contrary to the accepted norms of our society." This likely refers to the discouragement of homosexuality and demonstrates how, even before the emergence of an explicitly "LGBT" community, our opponents thought of us as one entity.[113]

In another case, even as it dismissed the charge against the defendant, the court discussed the validity of cross-dressing laws for enforcing gender norms. In *People v. Simmons*,[114] the defendant was arrested after being reported by the complainant, who believed the defendant to be a female prostitute.[115] The court's description of the facts of the case reveals that the defendant offered "to take care" of the complainant for $10.[116] In response, the complainant invited the defendant into his car and drove to a nearby dead-end street.[117] It is not clear what transpired

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109. Columbus v. Zanders, 266 N.E.2d 602, 604–06 (Ohio Mun. Ct. 1970).

110. *Id.* at 604.

111. *Id.*

112. Brief of Respondent in Opposition at 4, Mayes v. Texas, 416 U.S. 909 (1974) (No. 73-627).

113. Chicago v. Wilson, 389 N.E.2d 522, 532 (Ill. 1978); s*ee also* Doe v. McConn, 489 F. Supp. 76, 80 (S.D. Tex. 1980).

114. People v. Simmons, 357 N.Y.S.2d 362, 364 (N.Y. Crim. Ct. 1974).

115. *Id.*

116. *Id.*

117. *Id.*

between the defendant and the complainant, but the court's description states that at some point the complainant flagged down a police car and accused the defendant of stealing money from him while the two of them were in the car.[118] In response, the police arrested Simmons, who was charged with larceny, prostitution, and "criminal impersonation."[119]

The focus of the court's analysis was on the legitimacy of Simmons's gender expression. The opening three sentences of the opinion were, "The defendant is a male. When arrested he wore a woman's wig, dress, makeup and shoes. Following arrest he was searched, and his *true sex* was discovered."[120] Ultimately, the court dismissed the charge of criminal impersonation because it required proof that the person charged was impersonating "another," and in this case, no such impersonation could be shown.[121]

Not content to simply dismiss the criminal impersonation charge, the court opined at length about the significance and vibrancy of cross-dressing prohibitions. The court cited *Deuteronomy* 22:5, "The woman shall not wear that which pertaineth unto a man, neither shall a man put on a woman's garment: for all that do so are abomination unto the Lord, thy God," to support, in part, its conclusion that cross-dressing prohibitions broadly exist and reflect societal norms.[122] The court went even further to search for solutions in anthropology or biology for the deep commitment to social norms: "The anthropologists can perhaps explain whether this intolerance of cross-dressing characterizes other societies. Biologists may theorize that in the lower animal species, inability of the male and female of the species to recognize each other's differences may lead to frustration of the reproductive urge."[123] Regardless of the source, the court concluded that cross-dressing prohibitions existed broadly across the country, sometimes focusing on "transvestism" and other times focusing on "concealment of identity."[124] Either way, the court concluded, consistent with the other cases, that the state has the authority to prohibit cross-dressing.[125]

In another case, the arrest seemed based on the police officer's personal offense at being confronted by a cross-dressing person.[126] In *Archibald*, the defendant was arrested and charged with the offense of va-

118. *Id.*
119. *Id.*
120. *Id.* at 363 (emphasis added).
121. *Id.* at 364.
122. *Id.* at 365.
123. *Id.*
124. *Id.*
125. *Id.*
126. People v. Archibald, 296 N.Y.S.2d 834, 862–63 (N.Y. App. Term 1968).

grancy, a code subsection apparently titled "impersonating a female."[127] According to the majority opinion, the arresting officer reported that he had observed a group of three people engaged in loud conversation at four in the morning on a subway station platform.[128] One of the individuals, who was "wearing a white evening dress, high heel shoes, blonde wig, female undergarments,[129] and facial makeup,"[130] had the misjudgment to wink at the officer and walk away from him.[131] After the winking incident, the officer asked the defendant whether he was a boy or girl, and when the individual responded, "I am a girl,"[132] the officer arrested him. The court sustained the arrest.[133]

From the majority opinion, one can discern no context for the underlying conduct and might even suppose, from a contemporary perspective, the legitimacy of the appearance based on the defendant having a female identity.[134] It is only the dissenting justice who points out that the defendant had been at a masquerade party that night and was on his way home when the interaction with law enforcement occurred. Unlike the majority, the dissent found the local law that apparently criminalized appearing in public (and winking at a police officer) to be "an invalid exercise of the State's police power."[135]

3. Discouraging Homosexuality

Others argued that the prevention of homosexuality was the core issue of public policy at stake in banning cross-dressing. The City of Houston's lawyers articulated this stance in their briefs urging the Supreme Court to deny certiorari in *Mayes v. Texas*, a case challenging the city's cross-dressing law.[136] The lawyers argued that

> [s]ociety is presently thought to have an interest in barring homosexual acts since homosexuality is, at least partially, an acquired or taught trait. Our society deems it important not to have its youth learning to be homosexual rather than heterosexual. This interest is

127. *Id.* at 862.
128. *Id.*
129. It is completely unclear from the opinion how the officer knew of this fact.
130. *Id.* at 863.
131. *Id.* at 862.
132. *Id.* at 863.
133. *Id.*
134. The majority opinion suggests nothing dishonest about the defendant's response, "I am a girl," to the officer's question about gender.
135. Archibald, 296 N.Y.S.2d at 839 (Markowitz, J., dissenting).
136. Mayes v. Texas, 416 U.S. 909 (1974) (denying certiorari).

> in part rooted in the survival of the race; procreation is necessary to ensure the continuation of the human race.[137]

Because "dressing or disguising as a member of the opposite sex is a step toward creating homosexual relationships" it can be "proscribed in the same manner as more overt homosexual conduct."[138]

In *Archibald*, the dissent, which opposed application of a cross-dressing law to a non-transgender biological man who was merely dressed as a woman for a masquerade party, asserted that it was "within the province of legislative controls" to discourage "overt homosexuality in public places which is offensive to public morality."[139]

V. THE CROSS-DRESSING CASE FOR BATHROOM EQUALITY

The cross-dressing cases highlight the origins of the arguments that still dominate public conversation and misunderstanding of transgender issues. The same justifications are still used by anti-transgender activists to fight against nondiscrimination laws and transgender-inclusive bathroom policies: enforcement of gender norms, discouraging overt homosexuality, and prevention of fraud and crime. In this section, we compare the cross-dressing and bathroom cases to show how the logic underpinning both types of discriminatory laws lacks a legal basis.

A. Preventing Fraud and Crime: A Tussman & tenBroek Analysis

The fraud and crime fear looms large to this day, as evidenced by the public campaigns of anti-transgender activists across the country. The public hearings for the Massachusetts gender identity nondiscrimination law (like those for similar laws in other states) provide clear proof that the same beliefs and fears that animated the cross-dressing laws continue to fuel anti-transgender activism. But in both the cross-dressing and bathroom contexts, these crime-prevention arguments fall flat. The simultaneously overinclusive and underinclusive nature of the bathroom and cross-dressing prohibitions renders both of them constitutionally questionable. This is highlighted by the classic equal protection analysis advanced by Professors Tussman and tenBroek in their article, *The Equal Protection of the Laws*.[140]

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137. Brief of Respondent in Opposition at 3, *Mayes v. Texas*, 416 U.S. 909 (1974) (No. 73-627).

138. *Id.* at 3–4.

139. *Archibald*, 296 N.Y.S.D.2d at 838 (Markowitz, J. dissenting).

140. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws,* 37 CAL. L. REV. 341 (1949). According to one professor's calculations, this article is the fourteenth most-cited law review article in the entire body of legal literature. Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751 (1996).

The professors argued that

> [t]he Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.[141]

Thus, "[a] reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law."[142] As a result, "[i]t is impossible to pass judgment on the reasonableness of a classification without taking into consideration, or identifying, the purpose of the law."[143]

The professors reject the argument that a law is constitutionally permissible under the Equal Protection Clause merely because it treats all people targeted by the law in the same way. In fact, there are two categories to examine. "The first class consists of all individuals possessing the defining Trait (T)" targeted by the legislation. "The second class consists of all individuals possessing, or rather, tainted by, the Mischief (M) at which the law aims," that is, all those "similarly situated with respect to the purpose of the law."[144]

In their wide-ranging analysis, the professors analyze those laws that manage to be simultaneously "underinclusive" and "overinclusive." Both the cross-dressing and bathroom cases fit this category. In both, the aim of the legislation or police action is to prevent crimes or fraud by those using a disguise to evade police detection. This legislation targets—and, indeed, ends up focusing almost exclusively on—transgender people.

As for preventing disguises meant to confuse police, the law is underinclusive insofar as it fails to include every type of disguise that could fool police into thinking a person is an innocent passerby (e.g., dressing up as a nurse, an Amish person, a tourist, or any other stereotypical category of people not generally thought to have criminal intentions). The professors concede that underinclusive laws should usually be upheld, nonetheless, because of the "administrative" difficulties of achieving complete comprehensiveness and the traditionally "piecemeal" approach that legislators often take to solve problems.[145]

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141. Tussman & tenBroek, *supra* note 140, at 344.
142. *Id.* at 346.
143. *Id.* at 347.
144. *Id.*
145. *Id.* at 349.

When an underinclusive statute has a discriminatory motive, however, it should not be upheld. In our situation, the animus towards gender non-conforming people is clear. This is an impermissible motivation. As Tussman and tenBroek point out,

> when a classification is under-inclusive, the Court must satisfy itself that there is no fair reason for the law which would not require with equal force its extension to those whom it leaves untouched. It is relevant to inquire, in this connection, whether the failure to extend the law to others similarly situated is due to the presence of forbidden legislative motive.[146]

If police confusion is such a problem, why is gender the only category that these laws address?

The laws, however, are also overbroad in that they are directed at a group that does not meet the legislative purpose at all. It is a fallacy to include among the maliciously-disguised those people for whom their gender expression is not a disguise at all, but how they live their daily life and understand their deepest sense of self. It is "perfectly unreasonable" in the professors' view to pass a law where "no member of the class defined in the law is tainted with the mischief at which the law aims."[147] It is no more a disguise for a transgender person to dress in accordance with his or her gender identity than it is for a near-sighted person to wear glasses or a person with big feet to wear large shoes.

Even granting, for argument's sake, that transgender people are in "disguise," which itself betrays a deep ignorance of transgender people's lives and experiences, the laws are still impermissibly overinclusive because there is no significant risk of crime.[148] "Even in San Francisco (the U.S. city most likely to have the highest percentage of transgender women per capita), there has never been a single police report of a transgender woman harassing another woman in a bathroom."[149] In Tussman and tenBroek's view, overinclusive legislation of the sort that sweeps up huge numbers of innocents among the guilty is only appropriate in an emergency context, such as a war or disease outbreak, or when the "im-

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146. *Id.* at 360 (citing Mo., K & T Ry. Co. v. May, 194 U.S. 267, 269 (1903)).

147. *Id.* at 348.

148. In a case stemming indirectly from the June 3, 1972 arrests of three female impersonators performing at a Miami Beach nightclub, Judge Mehrtens held that the law "violates the equal protection clause of the 14th amendment because it virtually and arbitrarily prohibits men from wearing clothing inappropriate to their sex but does not prohibit women from wearing clothing inappropriate to their sex. . . ." *Unconstitutional: Court Voids Miami Beach Drag Bans*, ADVOCATE, July 19, 1972, at 4.

149. JULIA SERANO, WHIPPING GIRL: A TRANSSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY 242 (2007) (citing Tali Woodward, *Transjobless*, S.F. BAY GUARDIAN, March 15, 2006).

positions are relatively mild," such as with a road block.[150] As we discussed above, this imposition is far from mild on transgender people, often leading to health problems, grievous harassment, and employment discrimination. And no advocate of bathroom discrimination has ever presented one iota of evidence that transgender people pose more of a "danger" than any other group.

In addition, an argument used in a cross-dressing case that applies equally to the bathroom context is that there are laws on the books to punish any of the feared crimes a person could commit in the bathroom. "Particularly apparent is the fact that absent this ordinance the conduct of a [transgender person] remains subject to statutes or ordinances prohibiting soliciting, importuning, pandering obscenity, public indecency, trespassing, or soliciting rides or hitchhiking."[151] The denial of bathroom access is not only offensive and unfair, but also unjustifiable.

In the one cross-dressing case that does deal with an act of criminality, the defendant argued that she had a female gender identity, and thus, the law punishing disguises did not apply. In that case, two genetically male defendants dressed as women in order to convince a man that they were female prostitutes and that he should let them in the car.[152] Once in the car, they robbed him. The defendant appealed the court's application of a law that provided for enhanced penalties for "wearing a hood, mask, or other device that concealed his identity" while committing the crime.[153] The defendant argued against application of the enhancement because the defendant was, in fact, female-identified. The defendant pointed to "evidence at trial that the police knew him as a man who dresses as a woman . . . [and] contend[ed] his true identity is that of a woman."[154]

The court upheld the trial court's application of the law because, in their eyes, the defendant had offered insufficient evidence to show that this was not a disguise and because, unlike cases holding cross-dressing prohibitions unconstitutional, this was a prohibition "associated with criminal conduct and . . . public health, safety, morals and welfare."[155] The dissent argued that "[t]he days when a person's gender can be readily ascertained by the attire worn have passed," and that the language of the statute indicated an intent to prohibit "conceal[ing]" and not "disguis[ing] or alter[ing]" appearance.[156] Of course, there is no dispute that

150. Tussman & tenBroek, *supra* note 140, at 352.
151. Cincinnati v. Adams, 330 N.E.2d 463, 466 (Ohio Mun. Ct. 1974).
152. Fletcher v. State, 472 So.2d 537, 538 (Fla. Dist. Ct. App. 1985).
153. *Id.* at 539 (citing FLA. STAT. § 775.0845 (2009)).
154. *Id.*
155. *Id.* at 540.
156. *Id.* (Dauksch dissenting).

if the defendant had been found to be wearing women's clothes because the defendant identified as female, the applicable robbery or theft statute would have remained to convict the defendant of the crimes alleged. In Tussman and tenBroek's analysis, the prohibition on gender-based "disguises" would likely fail because of the overwhelming likelihood, borne out by the evidence, that it would be used to target transgender people exclusively.

A court applied reasoning similar to that used by Tussman and tenBroek in a recent Arizona case. The court in *Kastl v. Maricopa County Community College District* addressed the equal protection problems raised by denying transgender people access to appropriate bathrooms and denied the defendant's motion to dismiss a transgender plaintiff's § 1983 claim based on bathroom discrimination.[157] This case is distinguishable from many that we have discussed because the plaintiff argued, using medical proof, that she was indeed genotypically female even though she possessed male genitals.[158] Nevertheless, the court's reasoning for finding the defendant's policies unconstitutional applies to all transgender people.

> Although the Court agrees that Defendant possesses a legitimate interest in protecting the privacy and safety of its patrons . . . the Court fails to see, and Defendant fails to indicate, how the implementation of that policy in a manner which singles out nonconforming individuals, including transsexuals, for a greater intrusion upon their privacy is rationally related to such an interest.[159]

The court continued, "Though government action may be upheld if its connection to a legitimate interest is tenuous or the action is unwise, where 'the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.'"[160]

The plaintiff highlighted the discriminatory nature of the defendant's bathroom policy requiring proof of male genitals to use the men's room. First, only she and another transgender person were required to provide this proof. Second, the defendant refused to acknowledge her state-issued identification (that had a female gender marker). The court was unsympathetic to the defendant.

> Contrary to Defendant's suggestion that the justification for the policy is "readily apparent," the only justification of which the Court

157. Kastl v. Maricopa County Cmty. Coll. Dist., No. Civ.02-1531, 2004 WL 2008954, at *7, *10, (D. Ariz. June 3, 2004).

158. *Id.* at *1.

159. *Id.* at *8.

160. *Id.* (citing Romer v. Evans, 517 U.S. 620, 632–33 (1996)).

> can conceive is one predicated on one or more of the following baseless assumptions: 1) transsexuals pose a greater risk to minors' and others' safety than any other group; 2) a biological woman can never have lived or presented herself as a man; and 3) the presence of a biological woman with male genitalia invades the privacy and/or threatens the safety of other women.[161]

The court rejected all of these rationales and held the defendant's policy to be unconstitutional.

Besides being justified by this reasoning, Tussman and tenBroek's analysis has garnered support in the cross-dressing cases, and even—in the case of *Kastl*—a bathroom case. This well-established framework aptly defeats the criminal and fraud concerns surrounding barring transgender people from appropriate bathrooms.

B. Discouraging Homosexuality: An Unconstitutional Purpose

The opposition to overt homosexuality in cross-dressing cases also echoes contemporary objections. In both contexts, these arguments lack a legal basis. The privacy objection to transgender-inclusive laws is rooted in the idea that restricting restroom use to persons of the same sex guarantees privacy from the sexual (or otherwise "improper") gaze of others. In other words, the presumption that a woman's privacy is guaranteed by excluding men from a particular space rests on the presumption that only men would be interested in intruding on that privacy. The presumption says both too much and too little in presuming all men would violate a woman's privacy and that no women would. Neither is, of course, true. It also ignores the analytical divide that exists between gender identity and sexual orientation. Many transgender people are also gay, lesbian, or bisexual. Similar to the bathroom cases, the subtext of the cross-dressing cases is that transgender people are predators not to be trusted, especially in a bathroom setting involving nudity and private acts.

Of course, the same arguments have long motivated laws discriminating against gay and lesbian people. In 1978, State Senator John Briggs pushed for a ballot initiative that would have fired all gay and lesbian schoolteachers in California. At one event supporting the measure, Briggs argued that "[h]omosexuals want your children . . . . They don't have any children of their own . . . . That's why they want to be teachers and be equal status and have those people serve as role models

161. *Id.*

and encourage to join them."[162] The same vaguely predatory notions animated the Boy Scouts' argument for excluding homosexuals in the infamous *Boy Scouts of America v. Dale* case. In that case, Boy Scouts argued that gay people are inappropriate for leadership positions that involve "many overnight camping trips . . . a week together in summer camp, [and] . . . a far greater degree of intimacy among members than would be the case in a group that met only for formal meetings . . . ." The court continued, "When an 11 year-old boy away from home for the first time becomes afraid at night, skins his knee, or forgets his sleeping bag, he looks to his Scoutmaster for support."[163]

The ongoing debate over Don't Ask, Don't Tell (DADT) also centers on fears of the predatory homosexual. In 2008, at the first hearing on DADT since its passage, Elaine Donnelly, president of the Center for Military Readiness, warned of "transgenders in the military," "forcible sodomy," and spreading "HIV positivity" through the ranks.[164] Senator Saxby Chambliss of Georgia commented at a Senate Armed Services Committee hearing in 2010 that repealing Don't Ask, Don't Tell would lead to "alcohol use, adultery, fraternization, and body art."[165]

While *Dale* and Don't Ask Don't Tell remain the law of the land, the anti-gay sentiment at the heart of both cannot be questioned. Just as DADT is rejected by much of the country,[166] the view of transgender people as predators is similarly doomed to fade away.

C. Maintaining Traditional Gender Norms

In both the cross-dressing and bathroom contexts, the social norms-based argument that anatomy is determinative of a person's sex and, therefore, should dictate which restroom a person uses remains strong. Analysis of the cross-dressing cases reveals that fear of changing social norms was at the heart of the enforcement of such laws even while courts and society were acknowledging their diminishing legitimacy. Overall, the justifications closely mirror the safety and privacy objections raised in opposition to gender identity nondiscrimination laws protecting bath-

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162. RANDY SHILTS, THE MAYOR OF CASTRO STREET: THE LIFE AND TIMES OF HARVEY MILK 230 (1978).

163. Brief of Petitioners at 41, Dale v. Boy Scouts of America, 530 U.S. 640 (2000) (No. 99-699) (citations omitted).

164. Dana Milbank, *Sorry We Asked, Sorry You Told*, THE WASHINGTON POST, July 24, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/07/23/AR2008072303642.html.

165. Jillian Rayfield, *Chambliss: Repealing DADT Would Open Door to 'Adultery' and 'Body Art' in the Military*, TPM, Feb. 2, 2010, http://tpmlivewire.talkingpointsmemo.com/2010/02/sen-chambliss-repealing-dadt-opens-the-door-for-adultery-and-body-art-in-the-military.php.

166. Quinnipiac University, *U.S. Voters Say Gays in Military Should Come Out, Quinnipiac University National Poll Finds*, Feb. 10, 2010, http://www.quinnipiac.edu/x1295.xml?ReleaseID=1422.

room access. The diminishment of societal fears associated with the enforcement of cross-dressing laws presages the diminishment of related fears associated with objections to modern laws that would protect transgender people. As Professor William Eskridge points out, ultimately, "laws against cross-dressing were undermined by cultural acceptance of women's freedom to wear comfortable men's clothing."[167] Similarly, as the hysteria around transgender people's existence subsides, restrictive and discriminatory bathroom policies will go the way of the cross-dressing laws.

Many of the courts that sided with the defendants in cross-dressing cases did so because of an understanding of these changing gender roles and the corresponding declining importance of maintaining them. Just as bathroom cases described the presence of transgender people in bathrooms as "disconcerting"—as if people had a legal right to impose their social norms on others in order to be free from psychic disturbance—in *City of Chicago v. Wilson*, the court correctly identified the city's argument that cross-dressing by transgender people offended the public's "aesthetic preferences" as merely a justification for a prohibitive city ordinance. The court held

> the city has not articulated the manner in which the ordinance is designed to protect the public morals. It is presumably believed that cross-dressing in public is offensive to the general public's aesthetic preference. There is no evidence, however, that cross-dressing, when done as a part of a preoperative therapy program or otherwise, is, in and of itself, harmful to society. In this case, the aesthetic preference of society must be balanced against the individual's well-being.[168]

The court's ultimate balancing in *Wilson* is precisely what is needed in the bathroom cases. When the well-being of someone in nondiscriminatory and safe access to a bathroom is balanced against society's so-called comfort, founded in fear and misunderstanding of those with less traditional gender presentation, the reasoning of *Wilson* urges valuing the humanity of a marginalized person over the aesthetic preference of society at large. This is especially true given: (1) the impermanence of social norms of appearance, particularly gender-based ones; and (2) the ephemeral nature of the gendered biological assumptions behind the norms. The impermanence of social norms is obvious when viewed through a historical lens. Although seeing women in pants would have been dis-

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167. ESKRIDGE, *supra* note 91, at 226.

168. Chicago v. Wilson, 389 N.E.2d 522, 525 (Ill. 1978) (It should be noted that the court did not find the law to be invalid on its face, but only as applied to transgender people.).

concerting and offensive to many people 100 years ago, today it is ordinary, commonplace, and likely offensive only to a very small number of people.

Despite what seems like an obvious choice in valuing humanity over fleeting aesthetic comfort, at the root of the opposition to transgender bathroom equality lies the idea that sex-segregated bathrooms are meant for different groups of people based on their real or perceived physiological differences. This idea, that a real or perceived "genital test" motivates the bathroom debate, is simply untrue, as demonstrated in the informal policing of bathrooms.

According to a survey conducted by the Transgender Law Center, butch women or femme men who attempt to use a bathroom are frequently subjected to the same types of harassment and discrimination as transgender people.[169] It is common for many women who appear stereotypically masculine or insufficiently stereotypically feminine (whether a transgender or non-transgender woman), to be confronted by women and asked to confirm their anatomical or biological female identity.[170] That request for confirmation is simply for a verbal affirmation that the person is female, an affirmation that would impliedly confirm that the person perceived to be male has female genitals. For example, it is the experience of the author of this Article with the traditionally female name that when confronted in a bathroom by someone who presumes her to be male based on her gender presentation, a simple, "I am not in the wrong bathroom," successfully diffuses the stated opposition to her presence.

If such affirmation is made, then the objection to the masculine-appearing woman's use of the facilities is withdrawn. No change of appearance needs to take place; nor would the person confronted actually have to verbally, much less visually, confirm having female genitals. It is hard in the extreme to understand or articulate how the confirmation of the presence or absence of female genitals provides any real information whatsoever about the so-called offensive individual and why the non-verbal, non-explicit confirmation does enough to assuage any raised concerns.

In the formal context of the cross-dressing cases, these two principles of changing social norms and even the ephemeral nature of gendered biological assumptions root the courts' vagueness analysis. In one case, the court held that "[t]he defect is that the terms of the ordinance, 'dress not belonging to his or her sex,' when considered in the light of

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169. S.F. HUMAN RIGHTS COMM'N, GENDER NEUTRAL BATHROOM SURVEY (2001), http://transgenderlawcenter.org/pdf/sbac_survey.pdf.

170. *Id*.

contemporary dress habits, make it 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'"[171] Other courts rejected similar ordinances for the same reason.[172] Courts also emphasized the risk of arbitrary enforcement posed by such a vague law. One court held that "[s]uch boundless discretion granted by the ordinance encourages arbitrary and capricious enforcement of the law. It provides a convenient instrument for harsh and discriminatory enforcement by prosecuting officials, against particular groups deemed to merit their displeasure."[173]

Similarly, in the formal context as it plays out in bathrooms, prohibitions preventing transgender people from using a gender-concordant restroom are based on a standard that is impermissibly vague. Police officers may purport to use a "know it when I see it" approach to gender, but that is often as arbitrary as the cross-dressing laws. The genital test or, more accurately, the perceived-genital test that police claim to use is just as arbitrarily and inconsistently enforced. Police and employers (as in the *Goins* case) even ignore a state's vital records laws that grant legal status to change of gender.

In practice, legal authorities frequently do not rely on a genital test—much less a chromosome test—to determine who is a man or a woman. This was clearly demonstrated in a 2009 federal civil rights case brought by a female prisoner with Congenital Adrenal Hyperplasia.[174] Though chromosomally female, the plaintiff's condition led to "a hormonal imbalance which typically results in females assuming certain male characteristics," including "ambiguous external genitalia" and facial hair.[175] Despite pleading with officials to place her in the women's ward and presenting a doctor's note that she was indeed chromosomally female, the prison placed her in the "alternative lifestyle ward" among gay men and male-to-female transgender people. During the day, this ward mixed freely with the men's ward. In addition, the plaintiff was repeatedly strip-searched by male prison guards against her wishes that a

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171. Columbus v. Rogers, 324 N.E.2d 563, 565 (Ohio 1975).

172. D.C. v. St. Louis, 795 F.2d 652, 654 (8th Cir. 1986) (rejecting prior case law holding that the phrase "indecent or lewd behavior" was not vague, and holding, instead, that a cross-dressing law was, in fact, unconstitutionally vague because the law failed to provide adequate and explicit enforcement guidelines); *Cross-Dress Law Falls*, ADVOCATE, Sept.24, 1975, at 10 (Detroit judge held law void for vagueness. Notably, a fashion writer for the Detroit Free Press testified as an expert witness that "the distinction between male and female clothing has blurred tremendously and . . . clothes have become sexless.").

173. Cincinnati v. Adams, 330 N.E.2d 463, 466 (Ohio Mun. Ct. 1974) (citing Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)).

174. Tucker v. Evans, No. 07-CV-14429, 2009 WL 799175, at *1 (E.D. Mich. March 24, 2009).

175. *Id.*

female guard perform the searches.[176] Despite all of this, the court granted the prison's motion for summary judgment, holding that the plaintiff had failed to show that defendants should have known she was female and "crucially, plaintiff admitted that she did not appear to be female."[177] Even when authorities purport to be following a physiological rule to determine someone's gender, genotype is not what they actually use.

The bathroom and cross-dressing jurisprudence highlights the complicated nature of gender and sex and why transgender people must be accorded the same respect as non-transgender people in making that determination. In *Kastl v. Maricopa Community College*, the court rejected the defendant's argument for a genital test to determine bathroom access. In that case, as discussed above, the plaintiff argued that though she possessed male genitals, she was a "biological female."[178] The court pointed out, "plaintiff has stated that she is a biological woman. She lives and presents herself as a woman, and offered her state-issued driver's license to the defendant as proof of her biological sex . . . ."[179] Yet, this wasn't enough for the defendant, who required "proof" of the plaintiff's genitals. In holding for the plaintiff, the court reasoned that "were this information truly necessary to preserve the single-sex nature of the defendant's restrooms and the safety and privacy of their users, surely it would be sought from each person prior to granting restroom access," not just transsexual employees.[180] While the defendant argued that it had "a compelling interest in enforcing sex-segregated use of its restrooms in order to preserve the safety and privacy of all users," the court rejected the idea that it was constitutionally permissible to demand information about the plaintiff's genitalia to carry out that mission.[181]

The court further rejected the genital test, reasoning that

> genitalia is not the sole indicator of sex. While information concerning an individual's genitalia may assist Defendant in assigning that person to the restroom of a particular sex, reliance on that information to the exclusion of other offers of proof might lead to inaccurate determinations of sex. Obtaining information about Plaintiff's genitalia when her sex has otherwise been established there-

176. *Id.*

177. *Id.*

178. Kastl v. Maricopa County Cmty. Coll. Dist., No. Civ.02-1531, 2004 WL 2008954, at *1 (D. Ariz. 2004).

179. *Id.* at *6.

180. *Id.*

181. *Id.*

> fore cannot be said to be narrowly tailored to the Defendant's interest in determining sex for restroom use purposes.[182]

In addition, for the cross-dressing cases, courts accepted a Gender Identity Disorder diagnosis to be sufficient to warrant gender-appropriate clothing and bathroom usage even when the individuals had not undergone genital surgery. In *Doe v. McConn*, for instance, the court made it quite clear that the plaintiffs were "fully diagnosed transsexuals who, as of the commencement of this cause of action, had not undergone sexual reassignment surgery."[183] In the words of a contemporary account, the ruling held that the law was unconstitutional because "cross-dressing was an important part of therapy for people undergoing sex change."[184] It is important to note as well that, as the dissent in *City of Chicago v. Wilson* points out, the majority opinion in that case took for granted the transgender parties' participation in a psychiatric and medical treatment program.

> The only testimony in support of the defendants' claim was that of the defendants themselves. No psychiatrist was called to testify that the defendants had been diagnosed as transsexuals or that cross-dressing had been prescribed as preoperative therapy. No letter or statement was offered in evidence. Neither defendant named the psychiatrist from whom he was receiving treatment. Indeed, the defendant Wilson, on cross-examination, testified that he didn't know what sex-reassignment surgery would involve and said he did not know the doctor who would perform it.[185]

Also, as pointed out in the cross-dressing cases, the vital records laws of most states permit a change of legal gender status.[186] Forty-

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182. *Id.*

183. Doe v. McConn, 489 F. Supp. 76, 77 (S.D. Tex. 1980).

184. *For the Record—Short Takes: Houston*, ADVOCATE, Aug 20, 1981, at 12 (discussing *McConn*).

185. Chicago v. Wilson, 389 N.E.2d 522, 525 (Ill. 1978) (Ward, C.J., dissenting). This highlights an important fact: For many transgender people, in particular low-income people of color, access to medical and mental health practitioners is limited. A transgender person's gender identity is properly assumed to be correct based on their testimony alone.

186. "The jurisdictions that have gender reclassification policies for birth certificates also differ in their treatment of reclassified birth certificates. Some jurisdictions provide a new certificate with the changed information in place of the original information [Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Nebraska, Nevada, New Jersey, New Mexico, New York (state), North Carolina, Pennsylvania, Texas, Virginia, and Washington], [O]thers provide a certificate where the old information is visible but crossed out [Alabama, Alaska, Kansas, Mississippi, Missouri, Montana, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Utah, and West Virginia], and others leave it up to the discretion of a judge whether the certificate will be amended or a new one will be issued to replace it [Arkansas, Maryland, Minnesota, New Hampshire, South Dakota,

seven states permit transgender people to modify their birth certificates and other official documents to reflect change of gender, including those with transgender-inclusive nondiscrimination laws that have penalized transgender people for using the appropriate bathroom. To then bar those people from using the right bathroom places them in the untenable position of having no bathroom to use.

In *City of Chicago v. Wilson*, the court noted that it made little sense for the state to recognize sex reassignment surgery in its vital records laws but then punish those dressing in accordance with their gender identity. The court reasoned that since the vital records law

> authorizes the issuance of a new certificate of birth following sex-reassignment surgery, the legislature has implicitly recognized the necessity and validity of such surgery. It would be inconsistent to permit sex-reassignment surgery yet, at the same time, impede the necessary therapy in preparation for such surgery. Individuals contemplating such surgery should, in consultation with their doctors, be entitled to pursue the therapy necessary to insure the correctness of their decision.[187]

Similarly, in a 2005 immigration case, the Board of Immigration Appeals held that "The Defense of Marriage Act does not preclude, for purposes of Federal law, recognition of a marriage involving a post-operative transsexual, where the marriage is considered by the State in which it was performed as one between two individuals of the opposite sex."[188]

VI. CONCLUSION

The past twenty years have witnessed a revolution in transgender equality. More states are passing transgender-inclusive nondiscrimination laws, more corporations are enacting protections for gender identity and expression, and more Americans are taking up the fight for the equality of their transgender neighbors and friends. Yet, if transgender people cannot access appropriate bathrooms, then they truly cannot participate fully in our society.

In the cross-dressing cases and the bathroom cases, the same faulty arguments are offered to support bathroom discrimination: (1) that these laws are necessary to prevent crime; (2) that they are a safeguard against fraud; (3) that society's gender norms should be protected; and (4) that

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Vermont, Wisconsin, and Wyoming]." Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 770 (2008).

187. *Wilson*, 389 N.E.2d at 533–34.

188. *Matter of Lovo*, 23 I. & N. Dec. 746 (B.I.A. 2005).

they are a way to discourage homosexuality. The courts of the 1970s struck down the cross-dressing laws and rejected these arguments as unconstitutional. We have made the case in this Article that courts must recognize that these legally infirm arguments are no more proper in the bathroom context.